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IN THE

Supreme Court of the United States

October Term, 1963

No. 274

BACKUS PLYWOOD CORPORATION,

Petitioner,

against

COMMERCIAL DECAL, INC. AND ALFRED DUHRSSEN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

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Although respondents' memorandum is only three pages in length, it manages to contain at least two important misstatements which the writer believes should be clarified.

POINT I

The terms of the joint venture are not set forth in Exhibits A and A-1.

In the second paragraph of the first page of respondents' memorandum appears a statement that the terms of the joint venture are set forth "in petitioner's written offer (Exhibits A and A-1, pp. 24-29)." It is this statement and similar ones which misled the courts below. The terms

of the joint venture were not embodied in writing. The joint venture agreement was oral and was intended to be implemented by the writings. Exhibits A-1 and A-2, pages 24-26 * (there is no Exhibit A referred to by respondents), are only a small part of the implementation of the joint venture orally agreed upon by the parties. All of this is carefully set forth in the Petition (pp. 4-11 of the Petition). The full terms of the joint venture are set forth therein, together with references to the record.

It must be remembered that respondents claim that they are willing to have the motion for summary judgment determined on petitioner's version of the facts (23, 24 and p. 24 of the Petition).

From the very beginning (see Complaint, par. 10 set forth at p. 3), the petitioner claimed that the joint venture involved the reorganization of the business of the corporate defendant, including as part of the entire plan, the formation of a new corporation, the transfer of merchandise and machinery, the leasing of property and the management of the new business. It was not merely an agreement to perform separate acts, each of which separate acts, such as buying and selling machinery, renting real estate for five years or guaranteeing performance, is unenforceable under various New York Statutes of Frauds. It was the integrated whole which comprised the joint venture (which, as above set forth, respondents do not dispute since they accept petitioner's version of the facts) and such integrated whole has been held to be enforceable and not within the New York Statutes of Frauds.

* Page references are to the Appendix in the Court of Appeals.

POINT II

The decision herein of the Court of Appeals for the Second Circuit is in conflict with decisions of other U. S. Courts of Appeals on the application of the New York State Statutes of Frauds and is also in conflict with the decisions of the New York State Courts on the same matter.

At page 2, last paragraph of responden. s' memorandum, appears respondents' analysis of the applicable rule of this court authorizing certiorari. Respondents claim that although Rule 19 authorizes certiorari when the decision below is in "conflict with the decision of another court of appeals", the conflict to which reference is made must be on a question of Federal Law. No citation of authority is given for this interpretation. Accordingly, since the language is clear that certiorari is authorized when a decision is in conflict with the decision of another Court of Appeals on the same matter it must be presumed that this Court meant what it said, and accordingiy, certiorari should be granted in this case.

Furthermore, the respondents contend that the New York State Court of Appeals would make the final decision of the interpretation of a state statute. As petitioner has pointed out in the petition (Point 2), the decision of the Court of Appeals herein is in conflict with applicable New York State cases interpreting the New York State statutes, a clear ground for certiorari under Rule 19.

Of course, the New York Court of Appeals could not make the final decision in this case since it is not pending in the Courts of the State of New York but in the Federal Court. Accordingly, it is this Court which will make the final decision.

CONCLUSION

Since no effective answer has been made by respondents to the petition, it is respectively submitted that the petition for a writ of certiorari should be granted.

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CHARLES SINGER,
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